

5-20-2017

Lopez v. Vanbeek Herd Partnership Agency Record Dckt. 44160

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Vol. 1 of 1

CLERK

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant/Appellant,

v.

VANBEEK HERD PARTNERSHIP,
Employer, and STATE INSURANCE FUND,
Surety,

Defendants/Respondents

SUPREME COURT NO. 44160

AGENCY'S RECORD

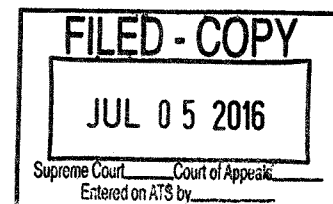
BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

Jerry Goicoechea
PO Box 6190
Boise, ID 83707-6190

Attorney for Respondents

Neil D McFeeley
PO Box 1368
Boise, ID 83701-1368



44160

COPY

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant/Appellant,

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COPY

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EXHIBITS LIST

Reporter's Transcript:

No hearing was held. The case was decided on stipulated exhibits and briefing by both parties.

Joint Exhibits:

- a. St. Benedicts Family Medical Center
- b. Tyler McKee, D.O.
- c. SIF 3-13-13 lower extremity impairment notice
- d. Trinity Ear, Nose & Throat
- e. A. Joseph Seitz, AuD
- f. Greg Schroeder, BC-HIS
- g. Christine W. Pickup, AuD
- h. Southwest Idaho Ear, Nose & Throat (DelRay Maughan, M.D.)
- i. SIF 10-2-13 hearing impairment notice

Additional Documents:

Claimant's Opening Brief, Filed November 30, 2015

Defendants' Reply Brief, Filed December 10, 2015

Claimant's Reply Brief, Filed December 22, 2015

AMENDED WORKERS' COMPENSATION COMPLAINT

I.C. No.: 2011-014149

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS Enrique Lopez [REDACTED]		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Jerry J. Goicoechea Goicoechea Law Offices, Chtd. Post Office Box 6190 Boise, Idaho 83707 (208) 336-6400
EMPLOYER'S NAME AND ADDRESS (at time of injury) Vanbeek Herd Partnership 83 W. 600 S. Jerome, ID83338		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTER'S) NAME AND ADDRESS: State Insurance Fund PO Box 83720 Boise, ID 83720
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE On or about: August 26, 2011
STATE AND COUNTY IN WHICH INJURY OCCURRED State of Idaho, County of Jerome		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: <u>\$2,400 per month</u> PURSUANT TO IDAHO CODE § 72-419

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

Charged/trampled by a bull.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Upper and lower extremity(ies), including, but not necessarily limited to: acute closed head injury with associated loss of consciousness, probable concussion; low back; acute left knee injury, with internal derangement necessitating surgical intervention; and bilateral hearing loss/dysfunction.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

1. Medical Treatment;
2. TTD and/or TPD benefits;
3. PPI benefits;
4. PPD in excess of PPI;
5. Attorney fees for the unreasonable delay/denial/contestation of worker's compensation benefits.

DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER

On or about: May 15, 2013

TO WHOM NOTICE WAS GIVEN

Supervisor

HOW NOTICE WAS GIVEN:

☒ ORAL

☐ WRITTEN

☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED

1. Entitlement to medical benefits;
2. Entitlement to TTD benefits;
3. Entitlement to PPI benefits once medically stable;
4. Entitlement to PPD in excess of PPI;
5. Whether the Supreme Court of Idaho's **Sanchez v. Galey**, 112 Idaho 609, 733 P.2d 1234 (1986) and **Pation v. Gregg & Anderson Farms**, 97 Idaho 251, 542 P.2d 1170(1975) decisions supersede **Diaz v. Franklin Building Supply**, 2009 IIC 0652 (2009);
6. Whether Claimant is legally vested with the right to make a claim for benefits, including, disability in excess of impairment premised upon labor markets within the United States, in accord with the Supreme Court of Idaho's **Sanchez v. Galey**, 112 Idaho 609, 733 P.2d 1234 (1986) and **Pation v. Gregg & Anderson Farms**, 97 Idaho 251, 542 P.2d 1170 (1975) decisions;
7. Whether as a matter of law and policy of law, Defendants are legally precluded from asserting the "alienage status" of an undocumented employee as a defense to avoid liability for benefits, including disability in excess of impairment;
8. Whether Defendants carry the burden of proof that Claimant is within a PPD coverage exemption;
9. Whether the Industrial Commission should retain jurisdiction over the issue of PPD in excess of PPI;
10. Whether the coverage exemption created by **Diaz v. Franklin Building Supply**, 2009 IIC 0652 (2009) vests Claimant with the ability to pursue a negligence based civil action outside of the Idaho Workers' Compensation Act against Defendant Employer for damages, including disability in excess of impairment; and

ORIGINAL

RECEIVED
JUDICIAL DIVISION
MAY 16 2013

11. Entitlement to an award of attorney fees for the unreasonable delay/denial/comproportion of worker's compensation benefits.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☒ YES ☐ NO IF SO, PLEASE STATE WHY.
Please see Nos. 5-11 above, which are believed to include issues not previously decided by the Commission.

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

IC1001 (Rev. 1/01/2004)

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

1. St. Alphonsus Regional Medical Center, 1055 N. Curtis Rd., Boise, ID 83706;
2. Joseph M. Verska, M.D., Boise Spine Surgery, 8756 W. Emerald St., Ste. 176, Boise, ID 83704; and
3. Samuel Jorgenson, M.D., Spine Institute of Idaho, 360 East Montvue Drive, Suite 100, Meridian, Idaho 83642.

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown at this time.

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ Unknown at this time.

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Unknown at this time

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES ☐ NO

DATE

6/5/14

SIGNATURE OF CLAIMANT OR ATTORNEY

[Signature] for

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY
FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES ☐ NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of June, 2014, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

Vanbeek Herd Partnership
83 W. 600 S.
Jerome, ID83338

SURETY'S NAME AND ADDRESS

State Insurance Fund
PO Box 83720
Boise, ID 83720

via: ☐ Personal service of process
☒ Regular U.S. Mail

via: ☐ Personal service of process
☒ Regular U.S. Mail

[Signature]
Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

Complaint – Page 2 of 3

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE ID 83720-0041

Patient Name: Enrique Lopez
Birth Date: [REDACTED]
Address: [REDACTED]
Phone Number: [REDACTED]
SSN or Case Number: [REDACTED]

(Provider Use Only)	
Medical Record Number: _____	
<input type="checkbox"/> Pick-up Copies	<input type="checkbox"/> Fax Copies # _____
<input type="checkbox"/> Mail Copies	
ID Confirmed by: _____	

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name – must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose or need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Enrique Lopez
Signature of Patient

5/6/14
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act

Date

Signature of Witness

Title

Date

2011 020952
I.C. NO. 2011014149

ANSWER TO COMPLAINT

INJURY DATE 8/26/11

- ☒ **The above-named employer or employer/surety responds to Claimant's Complaint by stating:**
☐ **The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:**

CLAIMANT'S NAME AND ADDRESS Enrique Lopez 321 E. Ave. F. Jerome, ID 83338	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Jerry J. Goicoechea Goicoechea Law Offices, Chtd. PO Box 6190 Boise, ID 83707
EMPLOYER'S NAME AND ADDRESS VanBeek Herd Partnership dba VanBeek Dairy 83 W 600 S. Jerome, ID 83338	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund P.O. Box 83720 Boise, ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Neil D. McFeeley Eberle, Berlin, Kading, Turnbow & McKlveen, Chtd. P.O. Box 1368 Boise, ID 83701 Telephone (208) 344-8535	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

IT IS: (Check One)	
Admitted	Denied
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>
NOT	APPLICABLE
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ☒ entirely ☐ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, § 72-419: \$553.85.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?
 Those already paid.

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

1. Defendants deny each and every allegation of the Complaint not specifically admitted herein.
2. Defendants contend that the condition of which Claimant complains may be attributable, in whole or in part, to a pre-existing injury, infirmity or condition for which Defendants, and each of them, are not responsible, such that Defendants' liability, if any, is subject to apportionment pursuant to the provisions of Idaho Code § 72-406.
3. Defendants deny that they have acted unreasonably and Claimant is therefore not entitled to an award of attorney fees pursuant to the provisions of Idaho Code § 72-804.
5. Defendants deny that Claimant is entitled to:
 - a. disability above impairment
 - b. additional medical treatment
 - c. TTD benefits
6. Whether Claimant is prohibited from seeking PPD benefits under *Diaz v. Franklin Building Supply*
7. Defense counsel has just received Claimant's Complaint and has not had sufficient opportunity to fully investigate the relationship of Claimant's condition to his/her work activities with the Employer. Defendants reserve the right to amend this Answer and allege further affirmative defenses as discovery is conducted.

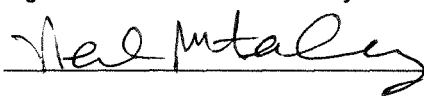
Under the Commission rules, you have 21 days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☐ YES

☐ NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE No.

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPI/PPD	TTD	Medical		
\$15,633.20	\$-0-	\$33,411.97	June 25, 2014	 Neil D. McFeeley Print or Type Name

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2014, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S
NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)

Enrique Lopez
c/o Jerry J. Goicoechea
Goicoechea Law Offices, Chtd.
PO Box 6190
Boise, ID 83707

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


 Signature
 Neil D. McFeeley
 Type or Print Name

Answer —Page 2 of 2

2nd AMENDED WORKERS' COMPENSATION COMPLAINT

I.C. No.: 2011-020952

ORIGINAL

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS Enrique Lopez 321 E. Ave. F. Jerome, ID 83338		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Jerry J. Goicoechea Goicoechea Law Offices, Chtd. Post Office Box 6190 Boise, Idaho 83707 (208) 336-6400
EMPLOYER'S NAME AND ADDRESS (at time of injury) Vanbeek Herd Partnership 83 W. 600 S. Jerome, ID83338		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTER'S) NAME AND ADDRESS: State Insurance Fund PO Box 83720 Boise, ID 83720
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE On or about: August 26, 2011
STATE AND COUNTY IN WHICH INJURY OCCURRED State of Idaho, County of Jerome		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: <u>\$2,400 per month</u> PURSUANT TO IDAHO CODE § 72-419
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)		

Charged/trampled by a bull.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Upper and lower extremity(ies), including, but not necessarily limited to: acute closed head injury with associated loss of consciousness, probable concussion; low back; acute left knee injury, with internal derangement necessitating surgical intervention; and bilateral hearing loss/dysfunction.

FILED

JUL - 2 2014

INDUSTRIAL COMMISSION

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? 1. Medical Treatment; 2. TTD and/or TPD benefits; 3. PPI benefits; 4. PPD in excess of PPI; 5. Attorney fees for the unreasonable delay/denial/contestation of worker's compensation benefits.	
DATE ON WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER On or about: May 15, 2013	TO WHOM NOTICE WAS GIVEN Supervisor
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY	
ISSUE OR ISSUES INVOLVED 1. Entitlement to medical benefits; 2. Entitlement to TTD benefits; 3. Entitlement to PPI benefits once medically stable; 4. Entitlement to PPD in excess of PPI; 5. Whether the Supreme Court of Idaho's <i>Sanchez v. Galey</i> , 112 Idaho 609, 733 P.2d 1234 (1986) and <i>Patton v. Gregg & Anderson Farms</i> , 97 Idaho 251, 542 P.2d 1170(1975) decisions supersede <i>Diaz v. Franklin Building Supply</i> , 2009 IIC 0652 (2009); 6. Whether Claimant is legally vested with the right to make a claim for benefits, including, disability in excess of impairment premised upon labor markets within the United States, in accord with the Supreme Court of Idaho's <i>Sanchez v. Galey</i> , 112 Idaho 609, 733 P.2d 1234 (1986) and <i>Patton v. Gregg & Anderson Farms</i> , 97 Idaho 251, 542 P.2d 1170 (1975) decisions; 7. Whether as a matter of law and policy of law, Defendants are legally precluded from asserting the "alienage status" of an undocumented employee as a defense to avoid liability for benefits, including disability in excess of impairment; 8. Whether Defendants carry the burden of proof that Claimant is within a PPD coverage exemption; 9. Whether the Industrial Commission should retain jurisdiction over the issue of PPD in excess of PPI; 10. Whether the coverage exemption created by <i>Diaz v. Franklin Building Supply</i> , 2009 IIC 0652 (2009) vests Claimant with the ability to pursue a negligence based civil action outside of the Idaho Workers' Compensation Act against Defendant Employer for damages, including disability in excess of impairment; and	

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☒ YES NO IF SO, PLEASE STATE WHY.
Please see Nos. 5-11 above, which are believed to include issues not previously decided by the Commission.

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

IC1001 (Rev. 1/01/2004)

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

1. St. Alphonsus Regional Medical Center, 1055 N. Curtis Rd., Boise, ID 83706;
2. Joseph M. Verska, M.D., Boise Spine Surgery, 8756 W. Emerald St., Ste. 176, Boise, ID 83704; and
3. Samuel Jorgenson, M.D., Spine Institute of Idaho, 360 East Montvue Drive, Suite 100, Meridian, Idaho 83642.

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown at this time.
WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$ Unknown at this time.
WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? Unknown at this time

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES ☐ NO

DATE

7/2/14

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY
FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES ☐ NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES ☐ NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2014, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

Vanbeek Herd Partnership
C/O Neil D. McFeeley
Eberle, Berlin, Kading, Turnbow &
McKlveen, CHTD.
PO Box 1368
Boise, ID 83701

SURETY'S NAME AND ADDRESS

State Insurance Fund
C/O Neil D. McFeeley
Eberle, Berlin, Kading, Turnbow &
McKlveen, CHTD.
PO Box 1368
Boise, ID 83701

via: ☐ Personal service of process
☒ Facsimile (208) 344-8542

via: ☐ Personal service of process
☒ Facsimile (208) 344-8542

Signature

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, a Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

(COMPLETE MEDICAL RELEASE FORM ON PAGE 3)

Complaint - Page 2 of 3

INDUSTRIAL COMMISSION
PO BOX 83720
BOISE ID 83720-0041

Patient Name: Enrique Lopez
Birth Date: 07/13/1979
Address: 440 E Ave. A. Wendell, ID
Phone Number: (208) 536-9991
SSN or Case Number: _____

(Provider Use Only)	
Medical Record Number:	
File Copy Copies:	File Copies #
Mail Copies:	
ID Confirmed by:	

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:

Provider Name - must be specific for each provider

To:

Insurance Company/Third Party Administrator/Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose or need for data:

(e.g. Worker's Compensation Claim)

Information to be disclosed:

Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug/Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Enrique Lopez
Signature of Patient

5/6/14
Date

Signature of Legal Representative & Relationship to Patient/Authority to Act

Date

Signature of Witness

Title

Date

Original Medical Record

Copy: Patient

Complaint - Page 3 of 3

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant,

v.

VANBEEK HERD PARTNERSHIP,

Employer,

and

STATE INSURANCE FUND,

Surety,
Defendants.

IC 2011-020952

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor. Claimant, Enrique Lopez, was represented by Justin Aylsworth, of Boise. Defendant Employer, Vanbeek Herd Partnership (Vanbeek), and Defendant Surety, State Insurance Fund, were represented by Neil McFeeley, of Boise. In lieu of a hearing, the parties agreed to submit the matter on stipulated exhibits. On October 21, 2015, Claimant filed his proposed list of medical providers, exhibits, and issues. On October 27, 2015, Defendants filed their Notice of Joinder in Claimant's proposed list of exhibits and requested issues. The parties then submitted post-hearing briefs. The matter came under advisement on December 23, 2015, and is now ready for decision.

ISSUES

The stipulated issues to be addressed are:¹

1. The proper methodology for calculating Claimant's hearing loss impairment; and

¹ Although not a stipulated issue, the issue of causation of Claimant's permanent hearing impairment is addressed hereafter.

2. The proper impairment rating.

CONTENTIONS OF THE PARTIES

All parties acknowledge that Claimant sustained an industrial accident while working for Vanbeek on August 26, 2011. Defendants accepted the claim and provided medical treatment. Defendants have paid Claimant permanent partial impairment benefits of 8% of the whole person for his hearing loss from his industrial accident. Claimant now requests additional permanent partial impairment benefits for his hearing loss. Defendants deny further impairment benefits.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Exhibits A through I (Bates Nos. 1-43), as stipulated by the parties.

After having considered the above evidence and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was born [REDACTED] On August 26, 2011, he was employed by Vanbeek as a dairy worker.

2. On August 26, 2011, Claimant's coworkers found him unconscious in a pen on Vanbeek's premises. Claimant regained consciousness while being transported to St. Benedicts Family Medical Center in Jerome for treatment. Claimant recalled a bull coming at him, but could not remember being hit or knocked down. He reported head, low back, and left knee pain, and buzzing in his right ear. After evaluation, he was found to have multiple contusions and abrasions, left knee meniscal tear, low back contusion, closed head injury, mild left ear hearing

loss, and profound right ear hearing loss. Defendants accepted the claim and provided medical treatment for Claimant's injuries.

3. Joseph Seitz, AuD., tested and treated Claimant for his hearing loss. On February 13, 2012, Dr. Seitz wrote that Claimant suffered mild high frequency hearing loss in his left ear and profound hearing loss in his right ear. On March 30, 2012, Dr. Seitz rated Claimant's hearing loss at "18% of total hearing impairment." Exhibit E, p. 30. Dr. Seitz recommended a behind the right ear hearing aid which Defendants authorized; however, it resulted in no right ear hearing improvement.

4. On May 4, 2012, Tyler McKee, M.D., performed arthroscopic left knee medial meniscectomy. On November 8, 2012, Dr. McKee rated Claimant's left knee impairment due to his industrial injury at 2% of the left lower extremity.

5. On June 10, 2013, Christine Pickup, AuD., reported that testing revealed Claimant had no speech audiometry responses in his right ear—confirming that he had no usable right ear hearing—and mild high-frequency hearing loss in his left ear. Dr. Pickup recommended a bilateral contralateral microphone positioned behind Claimant's right ear with wireless relaying of sound to a hearing aid positioned behind Claimant's left ear, known as a BICROS system. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss (right) pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides).

6. On November 17, 2013, Delray Maughan, M.D., reviewed Claimant's records and concurred in the BICROS system recommended by Dr. Pickup. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, together constituting a 22.9% binaural impairment which Dr. Maughan rated at

8% whole person permanent partial impairment. Dr. Maughan noted Claimant sustained his right ear total hearing loss secondary to his closed head injury on August 26, 2011.

7. Defendants provided Claimant a BICROS system that significantly improved his hearing. No physician has restricted Claimant's work activities due to his hearing loss.

8. Defendants have paid Claimant 8% whole person permanent partial impairment for his bilateral hearing loss.

DISCUSSION AND FURTHER FINDINGS

9. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

10. **Causation of impairment.** A claimant must provide medical testimony that supports his claim for compensation to a reasonable degree of medical probability, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995), and "probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

11. In the present case, Defendants assert Claimant has not proven that his mild left ear hearing loss is related to his industrial accident. Claimant responds that the issue of causation was not noticed for decision, was not agreed to by the parties, and was not included in

Claimant's Proposed List of Medical Providers, Exhibits, Issue(s) to be Determined, to which Defendants assented in their Notice of Joinder, and thus is not before the Commission.²

12. Assuming *arguendo* that Defendants appropriately contest the causation of Claimant's hearing impairment, the record establishes that Claimant's hearing loss is related to his industrial accident.

13. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear. Dr. Maughan noted Claimant:

sustained a unilateral total hearing loss (right) secondary to the closed head injury sustained 8/26/2011. This is well documented in the medical records. The left ear high frequency neurosensory hearing loss might or might not be related to the head injury. Without a pre injury audiogram I cannot exclude the head injury as the cause of the left ear loss, even though the pattern is consistent with a pre-existing noise induced high frequency hearing loss.

² Claimant criticizes Defendants for raising the issue of causation as not mentioned in the parties' stipulated list of issues. Claimant cites to Gomez v. Dura Mark, Inc., 152 Idaho 597, 272 P.3d 569 (2012), and argues "that to avoid due process complications, parties to work comp proceedings can stipulate to the 'prerequisites and elements of recovery,' which is exactly what transpired in this case." Claimant's Reply Brief, p. 3. In Gomez, the Idaho Supreme Court affirmed a Commission decision denying additional medical benefits because Gomez had not proven the need for such medical treatment was caused by the industrial accident—even though the issue of causation was not set forth in the notice of hearing. The Court declared:

[W]e hold that I.C. § 72-713 does not require specific notice of causation. Causation is put on issue by virtue of any claim regarding the reasonableness of medical benefits arising from an industrial accident or disease; even if reasonableness is found—without causation, there is no entitlement to benefits.

Gomez, 152 Idaho at 601-02, 272 P.3d at 573-74. Significant to the instant case, the Court expressly observed "causation is an issue whenever entitlement to benefits is at question." Gomez, 152 Idaho at 601, 272 P.3d at 573. Additionally, the Court expressly advised:

[T]his Court wishes to provide a clear message that without a specific stipulation that causation will be a contested issue at the hearing pursuant to I.C. § 72-713, and especially if there is a difference of opinion as to causation by opposing parties and their experts, claimant's attorneys should no longer be lulled by anything other than a stipulation to all legal prerequisites and elements for recovery and be prepared to present evidence of a causal connection between the industrial injury or sickness and the required treatment.

Gomez, 152 Idaho at 599, 272 P.3d at 571 (emphasis provided). In the present case, a "stipulation to all legal prerequisites and elements for recovery," was arguably lacking and Claimant was wisely prepared to present evidence of a causal connection between his industrial accident and his hearing impairment.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 5

Exhibit H, p. 38. After noting he could not exclude the industrial accident as the cause of the left ear hearing loss, Dr. Maughan concluded that Claimant suffered 22.9% binaural impairment, which he rated as 8% permanent partial impairment of the whole person. Dr. Maughan's appraisal is credible. In response to Dr. Maughan's letter, Surety's senior claims examiner notified Claimant: "The results of your medical evaluation indicate that your condition is fixed and stable, and that you have sustained in addition to your prior 2% left lower extremity permanent partial impairment rating a 8% permanent partial impairment of the whole person due to your bilateral hearing loss." Exhibit I, p. 43 (emphasis supplied). Surety's examiner then confirmed that monthly payments would be issued until the balance was paid in full.

14. Dr. Seitz examined Claimant and on March 30, 2012, rated his hearing impairment at "18% of total hearing impairment," Exhibit E, p. 30, based upon "a profound hearing loss on the right and a mild high-frequency loss on the left." Exhibit E, p. 32. Dr. Seitz observed that Claimant suffered hearing loss as a result of head trauma in August 2011. Significantly, Dr. Seitz specifically indicated that none of the impairment rating he assigned was due to a pre-existing condition.

15. Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The essence of both Dr. Maughan's and Dr. Seitz's ratings is that Claimant's left ear hearing loss is related to his industrial accident.

16. Claimant has proven that both his right and left ear hearing impairments are related to his industrial accident.³

17. **Calculation methodology and extent of permanent partial impairment.** The next issues are the proper methodology for calculating Claimant's permanent impairment and the extent thereof.

18. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

19. In the present case, several physicians have rated Claimant's permanent impairment due to his industrial accident. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss on the right pursuant to the Guides. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural

³ In response to Defendant's causation challenge herein, Claimant raises the issue of attorney fees pursuant to Idaho Code § 72-804—an issue not mentioned in the parties' stipulation of issues. Attorney fees was not an issue noticed in any fashion, is not "an issue whenever entitlement to benefits is at question," and is not properly before the Commission at this time.

impairment of his left ear, together constituting a 22.9% binaural impairment pursuant to the Guides which Dr. Maughan rated at 8% whole person permanent partial impairment.

20. Defendants assert that 8% impairment is appropriate per the Guides and is reasonable because so long as Claimant uses a BICROS system—which Defendants have provided—he has no work restrictions and no functional loss. Claimant persuasively notes that such correction by artificial means does not eliminate permanent impairment. In Burke v. EG & G/Morrison-Knudsen Const. Co., 126 Idaho 413, 885 P.2d 372 (1994), the Court stated:

In Kelley v. Prouty, 54 Idaho 225, 30 P.2d 769 (1934)], the Court said in determining the specific indemnity for loss of vision provided for in I.C. § 43-1113, which is now I.C. § 72-428, corrective glasses and “other artificial means” should not be considered. Id. at 245-46, 30 P.2d at 777. This direction was given to make sure that vision as corrected would not determine the degree of a claimant's loss of vision for purposes of specific indemnity.

Burke, 126 Idaho at 415-16, 885 P.2d at 374-75.

21. Claimant observes that when impairment ratings from the Guides or another source conflict with statutory scheduled impairment benefits, the statutory schedule is controlling. See Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 903, 591 P.2d 143, 150 (1979); Paul v. DeMarco Wood Products, 1990 IIC 0230, 0230.3 (1990). Claimant asserts that Idaho Code §§ 72-428 and 429, and prior case law mandate a comparative assessment or fixed mathematical calculation of his partial binaural hearing loss of either 18.8 or 20.1% permanent partial impairment as set forth more fully hereafter.

22. Idaho Code § 72-428. Claimant first asserts that the proper methodology for determining his permanent impairment is dictated by Idaho Code § 72-428 which provides in part:

§ 72-428. Scheduled income benefits for loss or losses of use of bodily members

An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively:

- | | |
|---|-------|
| (1) Amputations of Upper Extremities | Weeks |
| Forequarter amputation | 350 |
| | |
| (3) Loss of Vision and Hearing | |
| Total loss of vision of one eye | 150 |
| Loss of one eye by enucleation | 175 |
| Total loss of binaural hearing | 175 |
| (4) Total loss of use. Income benefits payable for permanent disability attributable to permanent total loss of use of [or] comparable total loss of use of a member shall not be less than as for the loss of the member. | |
| (5) Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use, of a member shall be not less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member. | |

Idaho Code § 72-428.⁴

23. Thus Idaho Code § 72-428(3) specifies 175 weeks for total loss of binaural hearing which equates to 35% permanent partial impairment (175 weeks ÷ 500 weeks = 35%).

⁴ At least as early as Thom v. Callahan, 97 Idaho 151, 154, 540 P.2d 1330, 1333 (1975), the Idaho Supreme Court noted that “The Workmen's Compensation Law contemplates evaluation of permanent impairment in terms of the ‘whole man,’ and in terms of impairment of body extremities as provided by the schedule of income benefits found in I.C. § 72-428.” Most recently in the case of Mayer v. TPC Holdings, Inc., 2015 IIC 0031, 2015 WL 4994298 (Idaho Ind. Com. 2015), the Industrial Commission examined Idaho Code § 72-428, and reaffirmed:

[T]he specific indemnities identified for partial and total loss of body parts represent benefits for what can only be characterized as “permanent impairments”. In short, what is clearly anticipated by Idaho Code § 72-428 is that if an injured worker is less than totally and permanently disabled, he is entitled to receive the payment of permanent impairment for total or partial loss of the body parts referenced in the statute. It is unclear why the statute specifies income benefits paid pursuant to the statute are for “permanent disability” when the payments are intended for what can only be described as “permanent impairment”.

Notably, the Guides, of which the Referee takes notice, also rate total loss of binaural hearing at 35% permanent impairment. Guides, p. 254.

24. Claimant argues that the Commission is required to apply a “fixed mathematical calculation per the ‘total loss’ scheduled mandates of I.C. § 72-428,” Claimant’s Opening Brief, p. 11, which Claimants designates, and is referred to hereafter, as a comparative assessment of partial loss impairments. Claimant asserts that since he sustained 100% right ear hearing loss, Idaho Code § 72-428(5) mandates a comparative assessment of partial loss impairments by which he is entitled to receive 50% of 175 weeks (which is one-half of the scheduled impairment for total loss of binaural hearing). Relying upon this same subsection, he claims an additional amount for his 7.5% left ear hearing loss in the amount of 50% of 7.5%, or 3.75% of 175 weeks. In total he claims 53.75% of 175 weeks, which equates to 18.8% permanent partial impairment. Alternatively, Claimant requests 50% of 175 weeks for right ear hearing loss plus 7.5% of 175 weeks for left ear hearing loss, thus totaling 57.5% of 175 weeks which equates to 20.1% permanent partial impairment.

25. Defendants point to the scheduled benefits for loss of vision of one eye in Idaho Code § 72-428(3) and assert that the statutory scheme shows that the legislature was well aware of how to specify scheduled benefits for loss of use of only one eye and could have done the same for loss of hearing in one ear, but did not. They allege that the impairment from the complete loss of hearing in one ear is not equivalent to half of the impairment warranted by total loss of hearing in both ears.⁵

⁵ Other provisions of the Worker’s Compensation Act recognize a substantial difference between partial and total loss of a sensory function. Idaho Code § 72-428(3) lists total loss of vision of one eye as a scheduled impairment warranting 150 weeks of benefits, equating to 30% permanent partial impairment. However, loss of vision in both eyes is presumptively deemed 100% total and permanent disability per Idaho Code § 72-407(1).

26. Clearly, total loss of hearing in one ear is not a scheduled impairment listed in Idaho Code § 72-428. Significantly, Idaho Code § 72-430 conclusively provides that partial loss of binaural hearing is not a scheduled impairment. It states in pertinent part:

Preparation of schedules—Availability for inspection—Prima facie evidence. The commission may prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries less than total, including, but not limited to, a schedule for partial loss of binaural hearing and for loss of teeth, and methods for determination thereof.

Idaho Code § 72-430(2) (emphasis supplied).⁶ Inasmuch as partial loss of binaural hearing is not a scheduled impairment, Idaho Code § 72-428(5) does not control the instant case and Claimant's arguments founded thereon are unpersuasive.

27. Idaho Code § 72-429. Claimant also argues that Idaho Code § 72-429 supports his request. It provides:

In all other cases of permanent disabilities less than total not included in the foregoing schedule the amount of income benefits shall be not less than the evaluation in relation to the percentages of loss of the members, or of loss of the whole man, stated against the scheduled permanent impairments, as the disabilities bear to those produced by the permanent impairments named in the schedule. Weekly income benefits paid pursuant to this section shall likewise be paid at fifty-five percent (55%) of the average weekly state wage for the year of the injury as provided in section 72-428, Idaho Code.

Idaho Code § 72-429 (emphasis supplied). Claimant asserts that the above emphasized statutory language mandates the comparative assessment of partial loss impairments according to his mathematical calculations previously set forth, and requires acceptance of his claim for 18.8% or 20.1% permanent impairment.

28. Certainly, as a catch-all provision for disability less than total, Idaho Code § 72-429 applies to the instant case. However, while applying to all non-scheduled impairment cases

⁶ The Commission has adopted no present schedule for determination of percentages of unscheduled permanent impairment for partial loss of binaural hearing.

where disability is less than total, upon a close reading, in contrast to Idaho Code § 72-428(5), Section 72-429 does not address loss of use, or partial loss of use but only “loss of the members.” Partial loss of binaural hearing is a partial loss of use.

29. Most significantly, the fact that the legislature via Idaho Code § 72-430(2) expressly authorized the Commission to “prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries ... for partial loss of binaural hearing” soundly refutes Claimant’s contention that the legislature intended Sections 72-428 and/or 429 to require that the Commission apply a “fixed mathematical calculation per the ‘total loss’ scheduled mandates of I.C. § 72-428.” Claimant’s Opening Brief, p. 11. Idaho Code § 72-429 does not mandate the comparative assessment of partial loss impairments that Claimant urges for his partial loss of binaural hearing.

30. Case law. Claimant also argues that past Supreme Court and Commission decisions require a comparative assessment of partial loss impairments according to the mathematical calculations he advocates. He cites Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989), Colson v. Guinn, 1984 IIC 0487 (1984), Carman v. Twin City Foods, 1985 IIC 0228 (1985), Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726 (Idaho Ind. Com. 2000), and Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987) to support his analysis.

31. Claimant maintains that the following pronouncement in Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 756, 769 P.2d 1122, 1128 (1989), supports his impairment evaluation methodology:

As guidance on remand, we note that the impairment attributable to an injured and replaced hip is not among the “scheduled permanent impairments” enumerated in I.C. § 72-428. Rather, it is an unscheduled impairment, to be determined by analogy to the statutory schedule. This analogizing process is sufficiently flexible

to recognize that a painful hip may produce greater functional loss than would an asymptomatic hip.

While the Court directed that unscheduled impairments be determined by analogy to the statutory schedule of Idaho Code § 72-428, it did not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

32. In Colson v. Guinn, 1984 IIC 0487.3 (1984), a doctor rated Colson's hand impairment at 5% as compared to the loss of the hand; the Commission concluded: "Pursuant to Idaho Code § 72-428, the loss of a hand entitles a claimant to benefits for 270 weeks so, under Section 72-429 the claimant in this case is entitled to receive permanent partial disability benefits for 5% of 270, or 13.5, weeks." Colson illustrates quantifying permanent impairment based upon a medical appraisal of the percentage of loss of a scheduled impairment. Colson does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

33. In Carman v. Twin City Foods, 1985 IIC 0228 (1985), Carman sustained a knee injury. In commenting generally on Idaho Code § 72-428, the Commission declared:

It provides that when a permanent disability involves the partial loss of use of a member set out in schedules found in 72-428, the period of time for which benefits as calculated under 72-428 shall be allowed shall bear the same proportion to the period of time allowed for total loss of use or loss of that member as the partial loss of use bears to the total loss of use or loss of that member.

Carman v. Twin City Foods, 1985 IIC 0228 at 11. Carman does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

34. In Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726, at 3 (Idaho Ind. Com. 2000), the Commission addressed the permanent impairment resulting from Johnson's partial binaural hearing loss stating:

Claimant has a severe hearing loss on the right and a profound loss on the left. The parties do not disagree that this is an 81% hearing loss equivalent to a 28% whole person impairment rating based upon the AMA Guidelines. Claimant can only hear in a very small range and it would sound like noise to him if amplified. Therefore, hearing aids would be of no use for verbal communication, but they could help to monitor his environment and assist in lip reading. This rating is consistent with Idaho Code § 72-428(3) that gives a 35% whole person impairment rating for total loss of binaural hearing. The Referee found, and the Commission concurs, that Claimant suffers an impairment of 28% due to his pre-existing hearing loss.

Thus the Commission received a medical appraisal of an 81% overall hearing loss based upon the then current AMA Guides and multiplied the 81% overall hearing loss by 35% impairment, based upon the statutory schedule for total binaural hearing loss, to obtain 28% permanent impairment ($81\% \times 35\% = 28\%$).

35. In Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987), the Commission evaluated a lesser partial binaural hearing loss and declared:

[C]laimant does suffer a permanent physical impairment for hearing loss which was occasioned by the noise he experienced at work during 1983. The Referee finds that claimant has a 20 percent loss of hearing as determined by Dr. Smedley. Since total loss of hearing would entitle claimant to 175 weeks of compensation under Section 72-428, Idaho Code, 20 percent loss of hearing would entitle claimant to 35 weeks of compensation, which is equivalent to an impairment of 7 percent of the whole man.

Thus the Commission again received a medical appraisal of a 20% overall hearing loss and multiplied the overall hearing loss by 35% impairment rating, based upon the statutory schedule for total binaural hearing loss, to obtain 7% permanent impairment ($20\% \times 35\% = 7\%$).

36. While Claimant cites Johnson and Wisner in support of his demand for comparative assessment of partial hearing loss impairment, neither case utilized or supports the

methodology Claimant urges herein. Rather, in both cases the Commission followed the guidance of Urry in analogizing the unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss). This is the proper method for calculating Claimant's partial binaural hearing loss impairment.

37. Following the precedent of Johnson and Wisner, and based upon Dr. Maughan's credible evaluation, Claimant's impairment for his partial binaural hearing loss is properly calculated as follows: 22.9% overall binaural hearing loss sustained x 175 weeks = 40.075 weeks; 40.075 weeks ÷ 500 weeks = 8% permanent impairment of the whole person.⁷

38. The Referee finds that Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss due to his industrial accident.

39. Claimant has not proven he is entitled to additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

CONCLUSIONS OF LAW

1. Claimant has proven both his left and right hearing impairments are related to his industrial accident.

2. The proper method for calculating Claimant's partial binaural hearing loss impairment is by analogizing his unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical

⁷ As set forth previously, Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, constituting a 22.9% binaural impairment which Dr. Maughan rated at 8% whole person impairment. Not surprisingly, Dr. Seitz's rating is reasonably similar. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment which would equate to 6.3% permanent impairment of the whole person (18% x 175 weeks = 31.5 weeks; 31.5 ÷ 500 weeks = 6.3% impairment).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 15

appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss).

3. Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss from his industrial accident. Defendants have paid 8% permanent impairment benefits for Claimant's hearing loss. Claimant has not proven he is entitled to any additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 25th day of March, 2016.

INDUSTRIAL COMMISSION



Alan Reed Taylor, Referee

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

JERRY J GOICOECHEA
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BOISE, ID 83707

NEIL MCFEELEY
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BOISE ID 83701-1368

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

FILED

APR 13 2016

INDUSTRIAL COMMISSION

INTRODUCTION

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The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Claimant was born [REDACTED] On August 26, 2011, he was employed by Vanbeek as a dairy worker.

2. On August 26, 2011, Claimant's coworkers found him unconscious in a pen on Vanbeek's premises. Claimant regained consciousness while being transported to St. Benedicts Family Medical Center in Jerome for treatment. Claimant recalled a bull coming at him, but could not remember being hit or knocked down. He reported head, low back, and left knee pain, and buzzing in his right ear. After evaluation, he was found to have multiple contusions and abrasions, left knee meniscal tear, low back contusion, closed head injury, mild left ear hearing

loss, and profound right ear hearing loss. Defendants accepted the claim and provided medical treatment for Claimant's injuries.

3. Joseph Seitz, AuD., tested and treated Claimant for his hearing loss. On February 13, 2012, Dr. Seitz wrote that Claimant suffered mild high frequency hearing loss in his left ear and profound hearing loss in his right ear. On March 30, 2012, Dr. Seitz rated Claimant's hearing loss at "18% of total hearing impairment." Exhibit E, p. 30. Dr. Seitz recommended a behind the right ear hearing aid which Defendants authorized; however, it resulted in no right ear hearing improvement.

4. On May 4, 2012, Tyler McKee, M.D., performed arthroscopic left knee medial meniscectomy. On November 8, 2012, Dr. McKee rated Claimant's left knee impairment due to his industrial injury at 2% of the left lower extremity.

5. On June 10, 2013, Christine Pickup, AuD., reported that testing revealed Claimant had no speech audiometry responses in his right ear—confirming that he had no usable right ear hearing—and mild high-frequency hearing loss in his left ear. Dr. Pickup recommended a bilateral contralateral microphone positioned behind Claimant's right ear with wireless relaying of sound to a hearing aid positioned behind Claimant's left ear, known as a BICROS system. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss (right) pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides).

6. On November 17, 2013, Delray Maughan, M.D., reviewed Claimant's records and concurred in the BICROS system recommended by Dr. Pickup. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, together constituting a 22.9% binaural impairment which Dr. Maughan rated at

8% whole person permanent partial impairment. Dr. Maughan noted Claimant sustained his right ear total hearing loss secondary to his closed head injury on August 26, 2011.

7. Defendants provided Claimant a BICROS system that significantly improved his hearing. No physician has restricted Claimant's work activities due to his hearing loss.

8. Defendants have paid Claimant 8% whole person permanent partial impairment for his bilateral hearing loss.

DISCUSSION AND FURTHER FINDINGS

9. The provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

10. **Causation and impairment.** A claimant must provide medical testimony that supports his claim for compensation to a reasonable degree of medical probability, Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995), and "probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974).

11. In the present case, Defendants assert Claimant has not proven that his mild left ear hearing loss is related to his industrial accident. Claimant responds that the issue of causation was not noticed for decision, was not agreed to by the parties, and was not included in Claimant's Proposed List of Medical Providers, Exhibits, Issue(s) to be Determined, to which

Defendants assented in their Notice of Joinder, and thus is not before the Commission.² In his recommendation, Referee Taylor did not resolve whether Claimant was unfairly surprised with the issue of causation, instead finding that the record established causation. Although as developed *infra*, the Commission agrees that Claimant has proven causation, the Commission finds it appropriate to address Claimant's arguments on surprise and unfairness. Idaho Supreme Court precedent instructs that causation is at issue any time benefits are sought, because without the demonstration of a causal relationship, there is simply no entitlement to benefits. Gomez v. Dura Mark, Inc., 152 Idaho 597, 272 P.3d 569 (2012). Therefore, the issue of causation does not need to be expressly delineated in the notice of hearing where workers' compensation benefits are sought. *Id.* Here, Claimant argues that at a pre-hearing telephone conference, the parties stipulated that causation was not contested. The Referee's pre-hearing telephone conference was

² Claimant criticizes Defendants for raising the issue of causation as not mentioned in the parties' stipulated list of issues. Claimant cites to Gomez v. Dura Mark, Inc., 152 Idaho 597, 272 P.3d 569 (2012), and argues "that to avoid due process complications, parties to work comp proceedings can stipulate to the 'prerequisites and elements of recovery,' which is exactly what transpired in this case." Claimant's Reply Brief, p. 3. In Gomez, the Idaho Supreme Court affirmed a Commission decision denying additional medical benefits because Gomez had not proven the need for such medical treatment was caused by the industrial accident—even though the issue of causation was not set forth in the notice of hearing. The Court declared:

[W]e hold that I.C. § 72-713 does not require specific notice of causation. Causation is put on issue by virtue of any claim regarding the reasonableness of medical benefits arising from an industrial accident or disease; even if reasonableness is found—without causation, there is no entitlement to benefits.

Gomez, 152 Idaho at 601-02, 272 P.3d at 573-74. Significant to the instant case, the Court expressly observed "causation is an issue whenever entitlement to benefits is at question." Gomez, 152 Idaho at 601, 272 P.3d at 573. Additionally, the Court expressly advised:

[T]his Court wishes to provide a clear message that without a specific stipulation that causation will be a contested issue at the hearing pursuant to I.C. § 72-713, and especially if there is a difference of opinion as to causation by opposing parties and their experts, claimant's attorneys should no longer be lulled by anything other than a stipulation to all legal prerequisites and elements for recovery and be prepared to present evidence of a causal connection between the industrial injury or sickness and the required treatment.

Gomez, 152 Idaho at 599, 272 P.3d at 571 (emphasis provided). In the present case, a "stipulation to all legal prerequisites and elements for recovery," was arguably lacking and Claimant was wisely prepared to present evidence of a causal connection between his industrial accident and his hearing impairment.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 5

informal and no transcript or recording exists. Moreover, Referee Taylor reports that he cannot recall whether Defendants conceded causation during the telephone conference. Possibly a legitimate misunderstanding exists as to what remained at issue for hearing. We cannot tell. The parties are cautioned that it is best to reduce all important understandings to writing. At any rate, we will not assume that the issue of causation has been waived by Defendants. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear. Dr. Maughan stated that Claimant:

sustained a unilateral total hearing loss (right) secondary to the closed head injury sustained 8/26/2011. This is well documented in the medical records. The left ear high frequency neurosensory hearing loss might or might not be related to the head injury. Without a pre injury audiogram I cannot exclude the head injury as the cause of the left ear loss, even though the pattern is consistent with a pre-existing noise induced high frequency hearing loss.

Exhibit H, p. 38. After noting he could not exclude the industrial accident as the cause of the left ear hearing loss, Dr. Maughan concluded that Claimant suffered 22.9% binaural impairment, which he rated as 8% permanent partial impairment of the whole person. The Commission disagrees with the Referee's conclusion that the above quoted appraisal is sufficient to prove that Claimant's left ear condition is causally related to the accident. However, the Commission finds that Dr. Seitz has provided the necessary opinion establishing a link between the accident and the left ear condition.

12. Dr. Seitz examined Claimant and on March 30, 2012, rated his hearing impairment at "18% of total hearing impairment," Exhibit E, p. 30, based upon "a profound hearing loss on the right and a mild high-frequency loss on the left." Exhibit E, p. 32. Dr. Seitz observed that Claimant suffered hearing loss as a result of head trauma in August 2011. Significantly, Dr. Seitz specifically indicated that none of the impairment rating he assigned was due to a pre-existing condition.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 6

13. Magic words are not necessary to show a doctor's opinion is held to a reasonable degree of medical probability; only plain and unequivocal testimony conveying a conviction that events are causally related. Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The essence of Dr. Seitz's ratings is that Claimant's left ear hearing loss is related to his industrial accident.

14. Claimant has proven that both his right and left ear hearing impairments are related to his industrial accident.³

15. **Calculation methodology and extent of permanent partial impairment.** The next issues are the proper methodology for calculating Claimant's permanent impairment and the extent thereof.

16. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non-progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, traveling, and non-specialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. Waters v. All Phase Construction, 156 Idaho 259, 262, 322 P.3d 992, 995 (2014), Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

³ In response to Defendant's causation challenge herein, Claimant raises the issue of attorney fees pursuant to Idaho Code § 72-804—an issue not mentioned in the parties' stipulation of issues. Attorney fees was not an issue noticed in any fashion, is not "an issue whenever entitlement to benefits is at question," and is not properly before the Commission at this time.

17. In the present case, several physicians have rated Claimant's permanent impairment due to his industrial accident. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment. Dr. Pickup opined that Claimant suffered a 100% hearing impairment for monaural hearing loss on the right pursuant to the Guides. Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, together constituting a 22.9% binaural impairment pursuant to the Guides which Dr. Maughan rated at 8% whole person permanent partial impairment.

18. Defendants assert that 8% impairment is appropriate per the Guides and is reasonable because so long as Claimant uses a BICROS system—which Defendants have provided—he has no work restrictions and no functional loss. Claimant persuasively notes that such correction by artificial means does not eliminate permanent impairment. In Burke v. EG & G/Morrison-Knudsen Const. Co., 126 Idaho 413, 885 P.2d 372 (1994), the Court stated:

In Kelley [v. Prouty], 54 Idaho 225, 30 P.2d 769 (1934)], the Court said in determining the specific indemnity for loss of vision provided for in I.C. § 43-1113, which is now I.C. § 72-428, corrective glasses and “other artificial means” should not be considered. Id. at 245-46, 30 P.2d at 777. This direction was given to make sure that vision as corrected would not determine the degree of a claimant's loss of vision for purposes of specific indemnity.

Burke, 126 Idaho at 415-16, 885 P.2d at 374-75.

19. Claimant observes that when impairment ratings from the Guides or another source conflict with statutory scheduled impairment benefits, the statutory schedule is controlling. See Paulson v. Idaho Forest Industries, Inc., 99 Idaho 896, 903, 591 P.2d 143, 150 (1979); Paul v. DeMarco Wood Products, 1990 IIC 0230, 0230.3 (1990). Claimant asserts that Idaho Code §§ 72-428 and 429, and prior case law mandate a comparative assessment or fixed mathematical calculation of his partial binaural hearing loss of either 18.8 or 20.1% permanent partial impairment as set forth more fully hereafter.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 8

20. Idaho Code § 72-428. Claimant first asserts that the proper methodology for determining his permanent impairment is dictated by Idaho Code § 72-428 which provides in part:

§ 72-428. Scheduled income benefits for loss or losses of use of bodily members

An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively:

- | | |
|---|-------|
| (1) Amputations of Upper Extremities | Weeks |
| Forequarter amputation | 350 |
| | |
| (3) Loss of Vision and Hearing | |
| Total loss of vision of one eye | 150 |
| Loss of one eye by enucleation | 175 |
| Total loss of binaural hearing | 175 |
| (4) Total loss of use. Income benefits payable for permanent disability attributable to permanent total loss of use of [or] comparable total loss of use of a member shall not be less than as for the loss of the member. | |
| (5) Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use, of a member shall be not less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member. | |

Idaho Code § 72-428.⁴

⁴ At least as early as Thom v. Callahan, 97 Idaho 151, 154, 540 P.2d 1330, 1333 (1975), the Idaho Supreme Court noted that “The Workmen's Compensation Law contemplates evaluation of permanent impairment in terms of the ‘whole man,’ and in terms of impairment of body extremities as provided by the schedule of income benefits found in I.C. § 72-428.” Most recently in the case of Mayer v. TPC Holdings, Inc., 2015 IIC 0031, 2015 WL 4994298 (Idaho Ind. Com. 2015), the Industrial Commission examined Idaho Code § 72-428, and reaffirmed:

[T]he specific indemnities identified for partial and total loss of body parts represent benefits for what can only be characterized as “permanent impairments”. In short, what is clearly anticipated by Idaho Code § 72-428 is that if an injured worker is less than totally and permanently disabled, he is entitled to receive the payment of permanent impairment for total or partial loss of the body parts referenced in the statute. It is unclear why the statute specifies income benefits paid pursuant

21. Thus Idaho Code § 72-428(3) specifies 175 weeks for total loss of binaural hearing which equates to 35% permanent partial impairment ($175 \text{ weeks} \div 500 \text{ weeks} = 35\%$). Notably, the Guides, of which the Commission takes notice, also rate total loss of binaural hearing at 35% permanent impairment. Guides, p. 254.

22. Claimant argues that the Commission is required to apply a “fixed mathematical calculation per the ‘total loss’ scheduled mandates of I.C. § 72-428,” Claimant’s Opening Brief, p. 11, which Claimants designates, and is referred to hereafter, as a comparative assessment of partial loss impairments. Claimant asserts that since he sustained 100% right ear hearing loss, Idaho Code § 72-428(5) mandates a comparative assessment of partial loss impairments by which he is entitled to receive 50% of 175 weeks (which is one-half of the scheduled impairment for total loss of binaural hearing). Relying upon this same subsection, he claims an additional amount for his 7.5% left ear hearing loss in the amount of 50% of 7.5%, or 3.75% of 175 weeks. In total he claims 53.75% of 175 weeks, which equates to 18.8% permanent partial impairment. Alternatively, Claimant requests 50% of 175 weeks for right ear hearing loss plus 7.5% of 175 weeks for left ear hearing loss, thus totaling 57.5% of 175 weeks which equates to 20.1% permanent partial impairment.

23. Defendants point to the scheduled benefits for loss of vision of one eye in Idaho Code § 72-428(3) and assert that the statutory scheme shows that the legislature was well aware of how to specify scheduled benefits for loss of use of only one eye and could have done the same for loss of hearing in one ear, but did not. They allege that the impairment from the

to the statute are for “permanent disability” when the payments are intended for what can only be described as “permanent impairment”.

complete loss of hearing in one ear is not equivalent to half of the impairment warranted by total loss of hearing in both ears.⁵

24. Clearly, total loss of hearing in one ear is not a scheduled impairment listed in Idaho Code § 72-428. Significantly, Idaho Code § 72-430 conclusively provides that partial loss of binaural hearing is not a scheduled impairment. It states in pertinent part:

Preparation of schedules—Availability for inspection—Prima facie evidence. The commission may prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries less than total, including, but not limited to, a schedule for partial loss of binaural hearing and for loss of teeth, and methods for determination thereof.

Idaho Code § 72-430(2) (emphasis supplied).⁶ Inasmuch as partial loss of binaural hearing is not a scheduled impairment, Idaho Code § 72-428(5) does not control the instant case and Claimant's arguments founded thereon are unpersuasive.

25. Idaho Code § 72-429. Claimant also argues that Idaho Code § 72-429 supports his request. It provides:

In all other cases of permanent disabilities less than total not included in the foregoing schedule the amount of income benefits shall be not less than the evaluation in relation to the percentages of loss of the members, or of loss of the whole man, stated against the scheduled permanent impairments, as the disabilities bear to those produced by the permanent impairments named in the schedule. Weekly income benefits paid pursuant to this section shall likewise be paid at fifty-five percent (55%) of the average weekly state wage for the year of the injury as provided in section 72-428, Idaho Code.

Idaho Code § 72-429 (emphasis supplied). Claimant asserts that the above emphasized statutory language mandates the comparative assessment of partial loss impairments according to his

⁵ Other provisions of the Worker's Compensation Act recognize a substantial difference between partial and total loss of a sensory function. Idaho Code § 72-428(3) lists total loss of vision of one eye as a scheduled impairment warranting 150 weeks of benefits, equating to 30% permanent partial impairment. However, loss of vision in both eyes is presumptively deemed 100% total and permanent disability per Idaho Code § 72-407(1).

⁶ The Commission has adopted no present schedule for determination of percentages of unscheduled permanent impairment for partial loss of binaural hearing.

mathematical calculations previously set forth, and requires acceptance of his claim for 18.8% or 20.1% permanent impairment.

26. Certainly, as a catch-all provision for disability less than total, Idaho Code § 72-429 applies to the instant case. However, while applying to all non-scheduled impairment cases where disability is less than total, upon a close reading, in contrast to Idaho Code § 72-428(5), Section 72-429 does not address loss of use, or partial loss of use but only “loss of the members.” Partial loss of binaural hearing is a partial loss of use.

27. Most significantly, the fact that the legislature via Idaho Code § 72-430(2) expressly authorized the Commission to “prepare, adopt and from time to time amend a schedule for the determination of the percentages of unscheduled permanent injuries ... for partial loss of binaural hearing” soundly refutes Claimant’s contention that the legislature intended Sections 72-428 and/or 429 to require that the Commission apply a “fixed mathematical calculation per the ‘total loss’ scheduled mandates of I.C. § 72-428.” Claimant’s Opening Brief, p. 11. Idaho Code § 72-429 does not mandate the comparative assessment of partial loss impairments that Claimant urges for his partial loss of binaural hearing.

28. Case law. Claimant also argues that past Supreme Court and Commission decisions require a comparative assessment of partial loss impairments according to the mathematical calculations he advocates. He cites Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 769 P.2d 1122 (1989), Colson v. Guinn, 1984 IIC 0487 (1984), Carman v. Twin City Foods, 1985 IIC 0228 (1985), Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726 (Idaho Ind. Com. 2000), and Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987) to support his analysis.

29. Claimant maintains that the following pronouncement in Urry v. Walker & Fox Masonry Contractors, 115 Idaho 750, 756, 769 P.2d 1122, 1128 (1989), supports his impairment evaluation methodology:

As guidance on remand, we note that the impairment attributable to an injured and replaced hip is not among the “scheduled permanent impairments” enumerated in I.C. § 72-428. Rather, it is an unscheduled impairment, to be determined by analogy to the statutory schedule. This analogizing process is sufficiently flexible to recognize that a painful hip may produce greater functional loss than would an asymptomatic hip.

While the Court directed that unscheduled impairments be determined by analogy to the statutory schedule of Idaho Code § 72-428, it did not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

30. In Colson v. Guinn, 1984 IIC 0487.3 (1984), a doctor rated Colson’s hand impairment at 5% as compared to the loss of the hand; the Commission concluded: “Pursuant to Idaho Code § 72-428, the loss of a hand entitles a claimant to benefits for 270 weeks so, under Section 72-429 the claimant in this case is entitled to receive permanent partial disability benefits for 5% of 270, or 13.5, weeks.” Colson illustrates quantifying permanent impairment based upon a medical appraisal of the percentage of loss of a scheduled impairment. Colson does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

31. In Carman v. Twin City Foods, 1985 IIC 0228 (1985), Carman sustained a knee injury. In commenting generally on Idaho Code § 72-428, the Commission declared:

It provides that when a permanent disability involves the partial loss of use of a member set out in schedules found in 72-428, the period of time for which benefits as calculated under 72-428 shall be allowed shall bear the same proportion to the period of time allowed for total loss of use or loss of that

member as the partial loss of use bears to the total loss of use or loss of that member.

Carman v. Twin City Foods, 1985 IIC 0228 at 11. Carman does not mandate the comparative assessment of partial loss impairments for partial loss of binaural hearing according to the methodology that Claimant herein advocates.

32. In Johnson v. Industrial Special Indemnity Fund, 2000 IIC 0040, 2000 WL 38726, at 3 (Idaho Ind. Com. 2000), the Commission addressed the permanent impairment resulting from Johnson's partial binaural hearing loss stating:

Claimant has a severe hearing loss on the right and a profound loss on the left. The parties do not disagree that this is an 81% hearing loss equivalent to a 28% whole person impairment rating based upon the AMA Guidelines. Claimant can only hear in a very small range and it would sound like noise to him if amplified. Therefore, hearing aids would be of no use for verbal communication, but they could help to monitor his environment and assist in lip reading. This rating is consistent with Idaho Code § 72-428(3) that gives a 35% whole person impairment rating for total loss of binaural hearing. The Referee found, and the Commission concurs, that Claimant suffers an impairment of 28% due to his pre-existing hearing loss.

Thus the Commission received a medical appraisal of an 81% overall hearing loss based upon the then current AMA Guides and multiplied the 81% overall hearing loss by 35% impairment, based upon the statutory schedule for total binaural hearing loss, to obtain 28% permanent impairment ($81\% \times 35\% = 28\%$).

33. In Wisner v. Shilo Automatic Sprinkler, 1987 IIC 1051 (1987), the Commission evaluated a lesser partial binaural hearing loss and declared:

[C]laimant does suffer a permanent physical impairment for hearing loss which was occasioned by the noise he experienced at work during 1983. The Referee finds that claimant has a 20 percent loss of hearing as determined by Dr. Smedley. Since total loss of hearing would entitle claimant to 175 weeks of compensation under Section 72-428, Idaho Code, 20 percent loss of hearing would entitle claimant to 35 weeks of compensation, which is equivalent to an impairment of 7 percent of the whole man.

Thus the Commission again received a medical appraisal of a 20% overall hearing loss and multiplied the overall hearing loss by 35% impairment rating, based upon the statutory schedule for total binaural hearing loss, to obtain 7% permanent impairment ($20\% \times 35\% = 7\%$).

34. While Claimant cites Johnson and Wisner in support of his demand for comparative assessment of partial hearing loss impairment, neither case utilized or supports the methodology Claimant urges herein. Rather, in both cases the Commission followed the guidance of Urry in analogizing the unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss). This is the proper method for calculating Claimant's partial binaural hearing loss impairment.

35. Following the precedent of Johnson and Wisner, and based upon Dr. Maughan's credible evaluation, Claimant's impairment for his partial binaural hearing loss is properly calculated as follows: 22.9% overall binaural hearing loss sustained x 175 weeks = 40.075 weeks; $40.075 \text{ weeks} \div 500 \text{ weeks} = 8\%$ permanent impairment of the whole person.⁷

36. The Commission finds that Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss due to his industrial accident.

37. Claimant has not proven he is entitled to additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

⁷ As set forth previously, Dr. Maughan opined that Claimant sustained a 100% monaural impairment of his right ear and 7.5% monaural impairment of his left ear, constituting a 22.9% binaural impairment which Dr. Maughan rated at 8% whole person impairment. Not surprisingly, Dr. Seitz's rating is reasonably similar. Dr. Seitz rated Claimant's hearing impairment at 18% of total hearing impairment which would equate to 6.3% permanent impairment of the whole person ($18\% \times 175 \text{ weeks} = 31.5 \text{ weeks}$; $31.5 \div 500 \text{ weeks} = 6.3\%$ impairment).

CONCLUSIONS OF LAW AND ORDER

1. Claimant has proven both his left and right hearing impairments are related to his industrial accident.

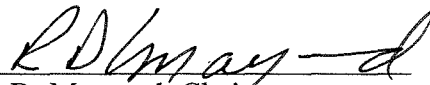
2. The proper method for calculating Claimant's partial binaural hearing loss impairment is by analogizing his unscheduled partial binaural hearing impairment to the statutory schedule of Idaho Code § 72-428(3); specifically, by relying upon a credible medical appraisal of the overall percentage of binaural hearing loss sustained, and then multiplying the overall percentage of binaural hearing loss sustained by 175 weeks of impairment benefits (as specified in Idaho Code § 72-428(3) for total binaural hearing loss).

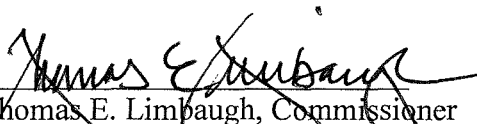
3. Claimant suffers permanent impairment of 8% of the whole person attributable to his partial binaural hearing loss from his industrial accident. Defendants have paid 8% permanent impairment benefits for Claimant's hearing loss. Claimant has not proven he is entitled to any additional permanent impairment benefits due to his partial binaural hearing loss from his industrial accident.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 14th day of April, 2016.

INDUSTRIAL COMMISSION


R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2016, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant - Appellant,

vs.

VANBEEK HERD PARTNERSHIP,
Employer; and STATE INSURANCE FUND,
Surety,

Defendants - Respondents.

IC No. 2011-020952

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENTS, Vanbeek Herd Partnership, State Insurance Fund, and their attorney of record, Neil D. McFeeley, 1111 W. Jefferson St., Ste. 530, Boise, ID 83702, AND THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, ENRIQUE LOPEZ, appeals against the above-named Respondents to the Idaho Supreme Court from the Industrial Commission's Findings of Fact, Conclusion of Law and Order entered in the

above-entitled proceedings on April 14, 2016, Chairman R. D. Maynard presiding.

2. Appellant has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rules 11(d), I.A.R.
3. Preliminary statement of the issue(s) on appeal pursuant to Rule 17(f) I.A.R.:

Whether the Idaho Workers' Compensation Act controls the method of computation for permanent partial binaural hearing loss impairment/disability.

4. If in existence, a Reporter's transcript and/or the Industrial Commission's minutes/summaries/reports/notes *etc.* are requested in their entirety from the pre-hearing status conference conducted on July 27, 2015.
5. Appellant requests that the following documents be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:
 - a. All Exhibits admitted into evidence as part of the "stipulated" hearing;
 - b. All briefing submitted by the parties;
 - c. Referee Alan Taylor's March 25, 2016, Findings of Fact, Conclusions of Law and Recommendation; and
 - d. Industrial Commission's April 14, 2016, Findings of Fact, Conclusions of Law and Order.
6. I certify that:
 - a. The Clerk of the Idaho Industrial Commission has been paid the estimated \$100.00 fee for preparation of the Reporter's transcript and Clerk's record;

- b. The appellate filing fee in the amount of \$94.00 has been paid; and,
- c. That service has been made upon the Reporter and all parties required to be served pursuant to Rule 20.

DATED this 3 day of May, 2016.

GOICOECHEA LAW OFFICES, CHTD.



Daniel J. Luker, Of the Firm
Attorneys for Claimant/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 3 day of May, 2016, I served a true and correct copy of the foregoing **NOTICE OF APPEAL** upon the following, by the method indicated below:

Neil D. McFeeley
EBERLE BERLIN
1111 W. Jefferson St., Ste, 530
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Attorney for Defendants

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() Hand Delivery
(☒) Facsimile (208) 344-8542



GOICOECHEA LAW OFFICES, CHTD.

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant/Appellant,

v.

VANBEEK HERD PARTNERSHIP,
Employer and STATE INSURANCE FUND,
Surety,

Defendants/Respondents

SUPREME COURT NO. 44160

CERTIFICATE OF APPEAL

Appeal From:

Industrial Commission,
R.D. Maynard, Chairman presiding

Case Number:

IC 2011-020952

Order Appealed from:

Findings of Fact, Conclusions of Law, and Order,
filed April 14, 2016.

Attorney for Appellant:

Jerry Goicoechea
PO Box 6190
Boise, ID 83707-6190

Attorney for Respondents:

Neil D, McFeeley
PO Box 1368
Boise, ID 83701-1368

Appealed By:

Claimant/Appellant, Enrique Lopez

Appealed Against:

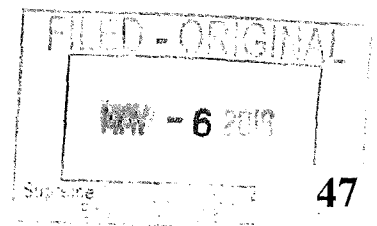
Defendants/Respondents, VanBeek Herd
Partnership and State Insurance Fund

Notice of Appeal Filed:

May 3, 2016

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2016 MAY -6 AM 9:23

CERTIFICATE OF APPEAL – (ENRIQUE LOPEZ) - 1



Appellate Fee Paid:

\$94.00 to Supreme Court and
\$100.00 to Industrial Commission
Checks were received.

Name of Reporter:

None

Transcript Requested:

No Hearing was held. The case was decided on
stipulated exhibits and briefing by both parties.

Dated:

May 5, 2016

Kenna Andrews
Assistant Commission Secretary

CERTIFICATE OF APPEAL – (ENRIQUE LOPEZ) - 2

CERTIFICATION OF APPEAL

Supreme Court No. 44160

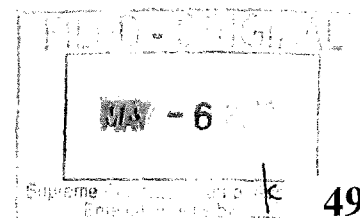
I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing are true and correct photocopies of the Notice of Appeal; Findings of Fact, Conclusions of Law, and Order, and the whole thereof, in IC case number 2011-020952 for Enrique Lopez v. VanBeek Herd Partnership, Employer and State Insurance Fund, Surety.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 5th day of May, 2016.



Kenna Andrus
Assistant Commission Secretary

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2016 MAY -6 AM 9:23



CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 44160 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Agency's Record herein.

DATED this 20th day of May, 2016.



Kenna Andrus
Assistant Commission Secretary

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

ENRIQUE LOPEZ,

Claimant/Appellant,

v.

VANBEEK HERD PARTNERSHIP,
Employer, and STATE INSURANCE FUND,
Surety,

Defendants/Respondents.

SUPREME COURT NO. 44160

NOTICE OF COMPLETION

TO: STEPHEN W. KENYON, Clerk of the Courts;
Jerry Goicoechea for the Appellant; and
Neil McFeeley for the Respondents.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant:

Jerry Goicoechea
PO Box 6190
Boise, ID 83707-6190

Attorney for Respondent(s):

Neil D Mcfeeley
PO Box 1368
Boise, ID 83701-1368

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions.

NOTICE OF COMPLETION (ENRIQUE LOPEZ - 44160) - 1

In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 20th day of May, 2016.

Kenna Andrews
Assistant Commission Secretary